



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 282 OF 2005**

**IN THE MATTER OF THE ESTATE OF JOSEPH NJAU KAIRU (DECEASED)**

**RULING**

1. The application I am called upon to determine is dated 1<sup>st</sup> November 2016. It principally seeks that the orders that the court made on 10<sup>th</sup> October 2016 on the application dated 6<sup>th</sup> May 2016 be set aside and that the said application, be heard afresh or there be such other directions thereon as the court may find fit. The grounds on the face of the application and in the affidavit sworn in support by Esther Wanjiku Njau are that the said application was never served on them, nor were they served with the hearing notice that led up to the making of the said orders, and therefore they were denied a fair hearing. She also states that the property the subject of the orders had been subdivided by the deceased and the subdivisions sold to third parties.

2. The respondent to the application, Peter Nyaga Kairu, has sworn an affidavit on 16<sup>th</sup> November 2016 in response to the said allegations. He avers that the application in question was served in open court on 10<sup>th</sup> May 2016 by his advocate to the advocate for the applicants herein and another party, and directions were given then that the parties then served in open court would file responses within fourteen (14) days. He concedes to the subdivisions alluded to by the applicants, but asserts that the same happened after the deceased died, and it is the legality of the subdivisions that is the subject of the civil suit. He, however, avers that one other asset the subject of the suit was still intact.

3. Directions were given on 12<sup>th</sup> July 2017 that the application of 1<sup>st</sup> November 2016 be canvassed by way of written submissions, to be filed within a stated period of time. The parties have complied and have filed detailed written submissions complete with the records that they proposed to rely on. I have read through the submissions and the decisions that the parties propose to rely on, and I have noted the arguments made therein.

4. The application seeks to set aside orders that were made herein earlier on. For me to effectively resolve the application, I will need to go back to the record on the events that led up to the making of the orders.

5.

10. It is not disputed that Mr. Kago was not served with notice of the hearing that was scheduled for 21<sup>st</sup> September 2016. So although he was aware of the application dated 6<sup>th</sup> May 2016, he was unaware of the hearing scheduled for 21<sup>st</sup> September 2016. He submits that his client was condemned unheard. The applicants herein cannot possibly be heard to complain that the application was never served on them so long as it was served on their counsel, and so long as he consented to being allowed time to respond to that application on 10<sup>th</sup> May 2016. What they can raise is the non-service of the hearing notice for 21<sup>st</sup> September 2016. However, can they be said to have had been condemned unheard merely because they had not been notified of the hearing of the application? They would be justified of so saying if they had not been served with the application. In this case, however, the application had been served, opportunity had been granted for filing of a response, but the applicants had not availed themselves of that opportunity. Their attendance would not have taken away from the fact that the application in question was at the time unopposed.

11. Regarding the subject land having been subdivided and sold to third parties, I do note that both sides conceded to pendency of a civil suit on these lands. It would be only right not to subject them to probate litigation when there is a more substantive matter where the issues relating to them can be effectively and effectually thrashed out.

12. In the end I am not persuaded that I should interfere with the orders made on 21<sup>st</sup> September 2016. The application before me is without merit. I hereby dismiss the same with no orders as to costs. Should the applicant be unhappy with the orders that I have made herein, there is liberty to challenge the same at the Court of Appeal, within twenty-eight (28) days.

**DELIVERED, DATED AND SIGNED at NAIROBI THIS 27<sup>TH</sup> DAY OF JULY, 2018.**

**W. MUSYOKA**

**JUDGE**